LIZIZ PLANTATION v. LIEW AH YONG

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[ORIGINATING SUMMONS NO: AA-24NCVC-82-02-2020]
6 SEPTEMBER 2020

CIVIL PROCEDURE: *Transfer of action – Application for – Application to transfer action from one High Court to another High Court of coordinate jurisdiction – Factors considered – Whether forum of court ought to be changed – Whether in interest of justice that proceedings be transferred – Rules of Court 2012, O. 57 r. 1(4)*

The plaintiff commenced the present action against the defendant, pursuant to ss. 327 and 329 of the National Land Code, seeking, *inter alia*, (i) an order for the removal of private caveats lodged by the defendant on certain pieces of land; and (ii) damages following the alleged wrongful entry of the caveats. Placing reliance on O. 57 of the Rules of Court 2012 ('ROC'), s. 23 of the Courts of Judicature Act 1964 and/or the inherent jurisdiction of the court, the defendant sought an order that the action be transferred to the High Court of Kota Bharu ('transfer application') ('encl. 5'), on the grounds that: (i) the cause of action arose in Kelantan as the lands were situated in Kelantan and the private caveats were entered at the Land and Mines Office, Kelantan; (ii) while his residential address was stated as in Ipoh, Perak, he currently resides in Kuala Terengganu, Terengganu; and (iii) in the event an order is granted for the removal of private caveats, witnesses from all over, including from Kota Bharu, including the defendant who was in Gua Musang, would have to be called for the assessment of damages.

Held (dismissing encl. 5 with costs):

(1) Order 57 r. 1(4) of the ROC provides that ' … before making any order to transfer any proceedings from the High Court to another High Court of coordinate jurisdiction … the High Court Judge … shall take into consideration whether the High Court … which shall hear the case is located at or nearest the place where (A) the cause of action arose; (B) the defendant, or one of several defendants, resides or has his place of business; (C) the facts on which the proceedings are based exist or are alleged to have occurred; (D) the land the ownership of which is disputed is situated; or (E) for other reasons it is desirable in the interest of justice that the proceedings should be transferred'. (para 7)

(2) The forms and statutory declarations filed for the entry of the private caveats showed, *inter alia*, that the defendant's residential and business addresses were in Ipoh, Perak. Little weight was given to the defendant's averments that he was currently residing in Terengganu. In any event, his residing in Terengganu did not aid in his transfer application for purposes of compliance with the factor in sub-para (B) of O. 57 r. 1(4)

of the ROC. It would be absurd if any one defendant could seek a transfer of proceedings just by relocating to another local jurisdiction in the course of proceedings and inviting the court to play catch-up. The factor in sub-para (B) of O. 57 r. 1(4) of the ROC had been complied with and the action should remain in this branch of the High Court. (paras 20, 38 & 40)

(3) The defendant's averment, that in the event an order is granted for the removal of the private caveats, witnesses from Kota Bharu, including himself in Gua Musang, would have to be called for the assessment of damages, was a bare averment. There were no supporting materials to support the submission and this would not be taken into consideration. It was premature at this stage as it was yet to be determined whether the plaintiff's action would be allowed and whether there would be any assessment of damages, if at all, and if so, by whom, when and where. (paras 41 & 42)

(4) In the circumstances of the case, and given the increasing acceptance of remote communication technology, it would not be in the interest of justice to allow the transfer application. It would not secure the expeditious and economical disposal of the action. With the experience gained in using remote communication technology in dealing with the Movement Control Orders, that was extant and necessitated by the Covid-19 pandemic, the physical location of any one litigant or witness and the issue of having to physically travel to any court have become very much less important. Hearings and meetings could now be done *via* a variety of internet platforms. (paras 43, 44 & 49)

Case(s) referred to:

Dalam Harta Pusaka Tasir Guntat v. Yusoff Che Hat; Salbiah Khamis & Anor (Citor) [2014] 1 LNS 1254 HC ***(refd)***

Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor [2020] 9 CLJ 192 FC ***(refd)***

Gasing Potensi Construction Sdn Bhd v. Hyper Act Marketing Sdn Bhd [2019] 1 LNS 407 HC ***(refd)***

Hap Seng Plantations (River Estates) Sdn Bhd v. Excess Interpoint Sdn Bhd & Anor [2016] 4 CLJ 641 FC ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***

KW Aquatic Supplies Sdn Bhd v. MERP Technologies Sdn Bhd [2019] 2 CLJ 403 HC ***(refd)***

Lim Guan Eng v. FZ Sdn Bhd & Anor [2014] 1 LNS 1599 HC ***(refd)***

Low Long Yoong & Anor v. Low Kok Choon & Anor [2014] 4 CLJ 577 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(refd)***

Megarina Sdn Bhd v. Enersafe Sdn Bhd [2002] 5 CLJ 478 HC ***(refd)***

Raja Thangiah v. Baldev Singh Bhar [2001] 7 CLJ 130 HC ***(refd)***

RHB Bank Bhd v. Wong Kok Leong & Wong Kok Sun & Anor [2017] 6 CLJ 1 FC ***(refd)***

SS Precast Sdn Bhd v. Serba Dinamik Group Bhd [2020] 1 LNS 316 HC ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***

Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 23(1), Schedule para 12
Federal Constitution, art. 121(1)
National Land Code, ss. 327, 329
Rules of Court 2012, O. 41 r. 1(4), O. 57, r. 1(4)(A), (B), (C), (D), (E)

For the plaintiff/respondent - CT Tenh & SK Tenh; M/s CK Lim, Tenh & Chong
For the defendant/applicant - Manshan Singh Jeswender Singh & Elizabeth Goh Yeek Li; M/s Skrine

Reported by Najib Tamby

JUDGMENT

Su Tiang Joo JC:

[1] With the growing acceptance of remote communication technology, should the forum of the court be changed to keep pace with where the defendant has his place of residence or business?

Nature Of Action

[2] The plaintiff filed this action on 21 February 2020 against the defendant for *inter alia* an order that private caveats lodged by the latter be removed pursuant to s. 327 of the National Land Code ("NLC"). The plaintiff claims amongst others that the entry of these private caveats was wrongful and seeks damages pursuant to s. 329 of the NLC.

[3] The private caveats were lodged under Presentation Number 42/2020 dated 7 January 2020 (hereinafter referred to as the "private caveats") over the lands held under issued documents of title PN 10052, PN 10051, HS(D) 702 Mukim Relai and HS (D) 1644, HS (D) 3928, HS (D) 3927 and HS (D) 3926 Mukim Ulu Nenggiri, Jajahan Gua Musang, Negeri Kelantan (hereinafter referred to as "the said lands").

The Transfer Application

[4] On 11 March 2020, the defendant took out an application *vide* encl. 5 pursuant to O. 57 of the Rules of Court 2012 and or s. 23 of the Courts of Judicature Act 1964 and or the inherent jurisdiction of the Honourable Court for an order that the action be transferred to the High Court in Malaya at Kota Bharu (hereinafter referred to as "the transfer application"). The plaintiff opposed the transfer application.

[5] In dealing with the transfer application, references were made to the originating summons, the three affidavits affirmed and filed on behalf of the plaintiff and three affidavits affirmed and filed by the defendant with exhibits in these affidavits running into more than one thousand pages. The affidavit in reply affirmed by the defendant in encl. 11 alone ran into 1189 pages. Both the plaintiff and the defendant each filed two sets of written submissions citing a total of 26 authorities.

A **Jurisdiction Of The High Court In Malaya At Ipoh**

[6] Right at the outset, it was admitted by the defendant and rightly so, that this court has the jurisdiction over this action bearing in mind the provisions of art. 121(1) of the Federal Constitution on the creation of only two High Courts; one, the High Court in Malaya and the other, the High B Court in Sabah and Sarawak. As was said by Lim Beng Choon J in *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55; [1988] 2 MLJ 268 at 270 para B:

> It is implicit that a High Court located at Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court C in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of where the cause of action arose in another state.

Grounds For The Transfer Application

D **[7]** Order 57 of the Rules of Court 2012 (hereinafter referred to as "O. 57") relied upon by defendant in support of the transfer application provides that:

> 1 (1) Where the Judge of the High Court or a Judge of the Sessions Court or a Magistrate **is satisfied that any proceedings in that Court can be** E **more conveniently or fairly tried in some other Court of co-ordinate jurisdiction**, he may on application by any party, order the proceedings to be transferred to the other Court.
>
> 1 (4) Before making any order to transfer any proceedings from:
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> (a) the High Court to another High Court of co-ordinate jurisdiction; F
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> *the High Court Judge or the Judge of the Sessions Court or Magistrate, as the case* G *may be, shall take into consideration whether the High Court or the Subordinate Court which shall hear the case is located at or nearest the place where:*
>
> *(A) the cause of action arose;*
>
> *(B) the defendant, or one of several defendants, resides or has his place of business;* H
>
> *(C) the facts on which the proceedings are based exist or are alleged to have occurred;*
>
> *(D) the land the ownership of which is disputed is situated; or*
>
> *(E) for other reasons it is desirable in the interests of justice that the* I *proceedings should be transferred.* (emphasis added)

[8] Both the plaintiff and the defendant are on common ground that no one single factor will prevail over the other. For this principle, the defendant relies upon the authority of *Gasing Potensi Construction Sdn Bhd v. Hyper Act*

Marketing Sdn Bhd [2019] 1 LNS 407 a decision of Mohd Radzi Harun JC (as His Lordship then was). The plaintiff on the other hand relied upon the case authority of *KW Aquatic Supplies Sdn Bhd v. MERP Technologies Sdn Bhd* [2019] 2 CLJ 403, a decision of Ahmad Shahrir Mohd Salleh JC and that of *Megarina Sdn Bhd v. Enersafe Sdn Bhd* [2002] 5 CLJ 478, a decision of Nik Hashim J (as His Lordship then was) for the proposition that where the law provides for several factors and uses the function word of "or" to indicate an alternative, they must be construed disjunctively and therefore so long as the plaintiff can satisfy one of the factors, the action can remain in the court in which the action was initiated.

[9] In *KW Aquatic Supplies Sdn Bhd v. MERP Technologies Sdn Bhd* [2019] 2 CLJ 403 at 414 para 34, Ahmad Shahrir Mohd Salleh JC went further to hold that:

> On the face of equally acceptable grounds for the transfer of proceedings ... and for the proceedings to remain ..., this court in the interest of justice, has to delve further into the facts and attempt to sieve determinant factors to assist in coming to a decision. In the case of *Low Long Yoong & Anor v. Lok Kok Choon & Anor* [2014] 4 CLJ 577; [2014] 2 MLJ 725 HC, His Lordship Nantha Balan JC (then HCJ, at the time of Ahmad Shahrir Mohd Salleh JC's judgment and now JCA at the time of writing this judgment) was of the view that the most important task is to ascertain which court had the closest nexus in the dispute. In the circumstances of this case, I would readily subscribe to this view.

[10] In seeking to persuade this court that the transfer application ought to be allowed, the defendant asserts in the transfer application that:

(i) the said lands are situated in Kelantan;

(ii) as the private caveats were entered at the Land and Mines Office in Kelantan, the cause of action arose in Kelantan;

(iii) the proceedings in this action will have a bearing on the registered owner of the said lands namely the Perbadanan Menteri Besar of Kelantan; and

(iv) while the defendant's residential address is listed in Ipoh, he currently resides in Kuala Terengganu where his business is based and where he spends most of his time.

Analysis Of The Defendant's Submissions

[11] In analysing the grounds relied upon by the defendant, I am required by O. 57 r. 1(4) (*supra*) to take into consideration the factors set out in sub-paras. (A) to (E) of this sub-rule which I have set out in para. [7] above. From here on, references to sub-paras. (A) to (E) shall mean references to sub-paras (A), (B), (C), (D) or (E) of O. 57 r. 1(4) as the case may be.

[12] From the grounds of the transfer application relied upon by the defendant and from the affidavits filed by the defendant, two factors contained in sub-paras. (A) and (C) were said to be in the defendant's favour

namely that because the private caveats had been entered in the Land and Mines Office in Kelantan the cause of action arose in Kelantan and closely related to this is that the act of lodgment of these private caveats in Kelantan would be part of the existence of facts on which the proceedings are based and are alleged to have occurred in Kelantan. Needless to say, the High Court at Kota Bharu is in the State of Kelantan.

[13] The defendant submitted that he currently resides in Kuala Terengganu in the State of Terengganu and by reason thereto, the requirement for the factor in sub-para. (B) is not met. More will be said on this later.

[14] That the defendant has no dispute over who owns the interest in the said lands meant that the factor in sub-para. (D) was not relevant to the transfer application.

[15] The defendant submitted that the proceedings in this action will have a bearing on the registered owner of the said lands namely the Perbadanan Menteri Besar of Kelantan. However, the action herein is for the removal of private caveats over the said lands. With the Perbadanan Menteri Besar being not a party to this action, the latter will not be bound by any order made: *Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor* [2020] 9 CLJ 192; [2020] MLJU 1144.

[16] The defendant went on to submit that the transfer application was not a delaying tactic and although he had filed another suit against the plaintiff and two others in Ipoh High Court Originating Summons No. AA-24NCC-3-02/2020, he did so because the Ipoh High Court was the *forum conveniens* for that matter. That such a submission is made, would suggest that the defendant was very much aware that in the event the transfer application was to be allowed, the proceedings in this action will be delayed with its attendant increase in costs as the matter will take some time to be transferred to the High Court at Kota Bharu and for the matter to be re-scheduled into the High Court's list at Kota Bharu. This does not augur well for the underlying need for the just, expeditious and economical disposal of the action.

[17] In considering the factors in sub-para. (A) and (C) on where the cause of action arose and the facts on which proceedings were based exist or were alleged to have occurred, the defendant helpfully referred to the case of *RHB Bank Bhd v. Wong Kok Leong & Wong Kok Sun & Anor* [2017] 6 CLJ 1; [2017] 4 MLJ 281 where the Federal Court cited with approval the case of *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749 which had reviewed a number of authorities and adopted with approval the definition of cause of action as:

> (a) "a factual situation the existence of which entitled one person to obtain from the court a remedy against another ...,";

(b) "the entire set of facts that gives rise to an enforceable claim, the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment ..."; and

(c) "that which makes the action possible ..."

[18] It follows that just because the private caveats were entered at the Land and Mines Office in Kelantan it does not necessarily mean that the cause of action arose in Kelantan. As settled by the Federal Court in the case of *RHB Bank Bhd (previously known as United Malayan Banking Corp Bhd and then as Sime Bank Bhd) v. Wong Kok Leong (as executor and trustee of the estate of Wong Kwong Wah, deceased) & Ors* (*supra*) the entire set of facts has to be taken into account and the entry of the caveats is but only one of the facts to be taken into account because it cannot be denied that an entry *simpliciter* does not *ipso facto* means it is unlawful: *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520.

[19] The grounds relied upon for the lodgment of the private caveats are also facts which make up the cause of action.

[20] A perusal of the forms and accompanying statutory declarations filed for the entry of the private caveats and exhibited in encl. 2 show that the grounds were settled in Kuala Lumpur with the defendant declaring that his address is at No. 2, Laluan Bercham Selatan 3/3, Taman Boulevard Timur, 31400 Ipoh, Perak claiming that he is entering the private caveats as a beneficiary shareholder of the plaintiff with its registered address at No. 81, Tingkat 1, Jalan Market, Ipoh, 31400 Perak and a business address at No. 27A Jalan Perajurit Ipoh Garden East Ipoh, 31400 Perak. It is, therefore, arguable where the cause of action arose and where the facts on which the proceedings are based exist or alleged to have occurred but as will be seen later in this judgment, in my opinion, these factors in sub-paras. (A) and (C) do not have a determinative effect on whether the transfer application ought to be allowed.

[21] Before I leave the analysis of the defendant's submissions, it would be fair to the defendant to mention that in both his written submissions, the defendant underscored the points that the cause of action did not arise in Ipoh but in Kelantan and he does not reside or have his place of business in Ipoh and although he concedes that there was never any dispute that this Honourable Court has jurisdiction over the action, it is not the *forum conveniens*. Reliance is placed by the defendant on the authority of *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22; [1999] 6 MLJ 112 a decision of His Lordship Augustine Paul J (as he then was) for the principle that:

> the critical issue for determination is whether this court is the *forum conveniens* to hear the dispute notwithstanding the fact that it has jurisdiction to do so.

[22] It is appropriate to observe that in the case of *Malacca Securities Sdn Bhd*, His Lordship Augustine Paul J was then deciding on a transfer application premised not upon the provisions of O. 57 r. 1 but upon the provisions of s. 23(1) of the Courts of Judicature Act 1964 (hereinafter referred to as "CJA") which are as follows:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose; or
>
> (b) the defendant or one of several defendants resides or has his place of business; or
>
> (c) the facts on which the proceedings are based exist or alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[23] The question then arises whether the added factor in sub-para. (E) "for other reasons it is desirable in the interest of justice" is *ultra-vires* s. 23(1) of the CJA and need not be considered. In my opinion, it is not because it cannot be gainsaid that the High Court was set up by the Federal Constitution to do justice and underlying its duty to do so, it should always have in the forefront of its mind, the interest of justice. In *Malacca Securities Sdn Bhd* (*supra*) itself at pp. 30-31 (CLJ); pp. 119-120 (MLJ), Augustine Paul J said:

> The result is that a plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state ... (at page 119 second paragraph)
>
> In declining to exercise jurisdiction a court does so not on grounds of convenience but of the suitability or appropriateness of another tribunal in the interests of all parties and for the **ends of justice** ... (at page 119 last paragraph followed through to page 120 first paragraph)
>
> (emphasis added)

[24] Thus, what is set out in sub-para. (E) of O. 57 r. 1(4) is only to express what is undeniably implicit in the court's duty to do take into account what is desirable to meet the interest or ends of justice.

Factor Of "For Other Reasons It Is Desirable In The Interest Of Justice" In Order 57 rule 1.

[25] The factor in sub-para. (E) requires the judge to be satisfied that the proceedings in this court can be conveniently or fairly tried in some other court and one of the factors that has to be considered is whether it is desirable in the interests of justice to have the proceedings transferred to the other court.

[26] In my opinion, the added factor of "for other reasons it is desirable in the interest of justice" was expressly set out in O. 57 r. 1(4) because the ROC 2012 has brought in a new regime in the disposal of cases whereby the progress of the case was no longer left in the hands of the litigants but with the court in the driver's seat: see *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301 Federal Court at para [18] as per Zulkifli CJ Malaya (as His Lordship then was). Although, this was decided in the context of an application to amend a defence, the underlying jurisprudence of the new regime for the need to secure the just, expeditious and economical disposal of the action is of general application. In the context of this transfer application under O. 57 r. 1, this underlying jurisprudence should be borne in mind.

[27] The defendant had very helpfully collated in his bundle of authorities in encl. 27 several authorities on the construction and application of O. 57 r. 1. On these authorities in my opinion:

(i) the additional factor in sub-para. (E) was not discussed and applied in the cases of *Gasing Potensi Construction Sdn Bhd v. Hyper Act Marketing Sdn Bhd* [2019] 1 LNS 407 and *Low Long Yoong & Anor v. Low Kok Choon & Anor* [2014] 4 CLJ 577; [2014] 2 MLJ 725;

(ii) the case of *Raja Thangiah v. Baldev Singh Bhar* [2001] 7 CLJ 130 HC was decided before the introduction of O. 57 r. 1; and

(iii) the Federal Court authority of *Hap Seng Plantations (River Estates) Sdn Bhd v. Excess Interpoint Sdn Bhd & Anor* [2016] 4 CLJ 641; [2016] 3 MLJ 553 in dealing with the power to transfer any proceeding to any other court held that para. 12 of the Schedule to the CJA has to be read in the light of s. 3 of the CJA and O. 57 r. 1 and the FC went on to hold that the High Court in Malaya does not have the jurisdiction to transfer any proceeding in the High Court in Malaya to the High Court in Sabah and Sarawak because local jurisdiction is defined to mean the territory comprised in the States of Malaya and a transfer of proceedings in the context of O. 57 r. 1(4) ROC can only mean the power to transfer within the territorial jurisdiction of either the High Court in Malaya or High Court in Sabah and Sarawak.

[28] None of the cases referred to above by the defendant dealt with the factor in sub-para. (E) of "for other reasons it is desirable in the interest of justice" which gives the court the discretion to take into account other reasons in the interest of justice which the court strives to serve. Whether it would be in the interest of justice to allow the transfer would be dependent upon the facts of each case.

[29] The defendant cited two other cases where the transfer applications were allowed; *Dalam Harta Pusaka Tasir Guntat, Yusoff Che Hat v. Salbiah Khamis & Anor* [2014] 1 LNS 1254 and *Lim Guan Eng v. FZ Sdn Bhd & Anor* [2014] 1 LNS 1599; [2015] 8 MLJ 469. The first case was an administration

of estate case and the other a defamation case, both of which have to be tried with witnesses and where in the former, the mobility of one of the witnesses in attending court weighed heavily in the mind of the learned judge. As will be seen later, the importance of the mobility of witnesses attending court is now of much less importance. However, it is to be observed that in *Dalam Harta Pusaka Tasir Guntat*, Yusoff Che Hat, Wong Teck Meng JC (as His Lordship then was) at para. 46 of his judgment in dealing with the transfer application made pursuant to O. 57 r. 1(4) grounded his decision on the "in the interest of justice" provision and eloquently said the court is the "... protector of justice ..."

Application Of Sub-paragraph (E) - "For Other Reasons It Is Desirable In The Interest Of Justice"

[30] I now turn to consider the facts and in particular the underlying premise of this action.

[31] The action is for the removal of the private caveats lodged by the defendant over the said lands.

[32] It is not disputed by the parties that the plaintiff has an interest in the said lands in the form of a lease of the said lands for 66 years.

[33] Both learned counsel for the plaintiff and the defendant agreed when asked during the hearing of the transfer application on 3 September 2020 that the critical issue in the main action is whether the defendant who lodged the private caveats has any registrable interest in or a right to claim title to the said lands.

[34] Without deciding on the merits of the action, my view is that this critical issue is a question of law which can be tried without the necessity of calling witnesses as the facts of lodgment of the private caveats, why and where they were lodged have been set out in the affidavits filed in this action and are undisputed. It only remains to be decided whether as a matter of law, the lodgments were lawful.

[35] In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520, the Court of Appeal said that:

> **In considering an application for the removal of a caveat, the procedure to be adopted should be a simple and summary one** with the first stage being to examine the grounds expressed in the application for the caveat and once the court is satisfied that the caveator's claim amounts **in law** to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies. (emphasis added)

[36] Based upon the authority of *Luggage Distributors (M) Sdn Bhd*, the factors of where the cause of action arose and where the facts on which the proceedings are based exist or are alleged to have occurred would not be

determinative of the transfer application by reason of the procedure that is to be adopted for the purposes of the hearing of this action. Pursuant to this procedure, the action can just as conveniently and fairly be tried in this court.

[37] More importantly, with the proceedings in this action having reached an advanced stage of being ready for hearing, it would not be in the interest of justice to have the action transferred to another court as a transfer would not secure the just, expeditious and economical disposal of the action.

[38] In the prescribed forms for the lodgment of the private caveats *viz.*, Form 19B and the statutory declarations affirmed by the defendant accompanying the prescribed forms which were exhibited in the affidavit in support of the main action (encl. 2) and also referred to by the defendant in his transfer application, the defendant had affirmed that his address is at No. 2, Laluan Bercham Selatan 3/3, Taman Boulevard Timur, 31400 Ipoh, Perak. This amply supports the plaintiff's submission that the factor in sub-para. (B) has been complied with and the action should remain in this branch of the High Court in Malaya.

[39] On top of that, a perusal of the affidavits filed by the defendant in support of the transfer application in encls. 6 and 20 show that he had affirmed that his place of residence is that of No. 2, Laluan Bercham Selatan 3/3, Taman Boulevard Timur, 31400 Ipoh, Perak. Order 41 r. 1(4) ROC mandates that every affidavit shall *inter alia* state the place of residence of the deponent. Having affirmed statutory declarations and affidavits that he resides in Ipoh, it does not lie in the mouth of the defendant to say otherwise.

[40] It follows that for purposes of this transfer application, this court should give little weight to the defendant's averment that he currently resides in Kuala Terengganu. In any event, his residing in Kuala Terengganu does not in any way aid his transfer application to have the action transferred to the High Court in Malaya at Kota Bharu for purposes of compliance with the factor in sub-para. (B). It would be absurd if any one defendant can seek a transfer of proceedings just by relocating to another local jurisdiction in the course of proceedings and inviting the court to play catch-up.

[41] The defendant also submitted during oral submissions on 3 September 2020 that in the event an order is granted for the private caveats to be removed, witnesses from all over including witnesses from Kota Bharu including the defendant who is now in Gua Musang will have to be called for the assessment of damages.

[42] However, with all due respect to the defendant, this is a bare averment or more commonly known as making a submission from the Bar without any supporting materials to support the same and the court will not take it into consideration. It is also premature at this stage as it is yet to be determined whether the plaintiff's action would be allowed and whether there would be any assessment of damages, if at all, and if so by who, when and where.

[43] In any event, with the experience gained in using remote communication technology in dealing with the movement control order, conditional movement control order and the recovery movement control order that is extant and which were necessitated by the COVID-19 pandemic, the physical location of any one litigant or witness and the issue of having to physically travel to any court has become very much less important.[1]

[44] The need for counsel, litigants and witnesses to physically travel to the court for the hearing of their matters is getting less and less. Hearings and meetings can now be done and are, by reason of the COVID-19 pandemic, encouraged to be done electronically *via* a variety of internet platforms[2] such as "Zoom" or "Skype" not to mention that there are other platforms as well such as "Google Duo", "Google Hangouts", "MS Teams" and "Adobe Connect".[3]

[45] In fact, with the aid of video conferencing and given the restrictions in air travel caused by the COVID-19 pandemic, you can, for example, have a court sitting in the British Virgin Islands ("BVI") conducting a trial with participation by counsel from the United Kingdom, solicitors from Singapore and Hong Kong and witnesses from Hong Kong, Australia and Malaysia all from the comfort of their respective offices or homes without having to fly out to the court in the BVI.[4] If this can be done across countries, what more is to be said about the importance and necessity, if any, of litigants and witnesses residing in Malaysia having to be physically present in a particular branch of the High Court in Malaya.

[46] The Malaysian courts have kept up with the march of technology. Case management of cases by way of e-reviews[5] is widely used and paperless hearings with the aid of technology in the Federal Court has commenced this year.[6]

[47] The first virtual hearing with the parties being not physically present in court was conducted by the Court of Appeal *via* tele-conferencing on 23 April 2020 and live-streamed to the public with the three learned judges comprising the panel of the Court of Appeal hearing the matter seated separately in each of their chambers/homes and learned counsel for the parties seated in their own respective office/home.[7]

[48] Recently, in *SS Precast Sdn Bhd v. Serba Dinamik Group Bhd* [2020] 1 LNS 316; [2020] MLJU 400, Wong Kian Kheong J conducted three applications through "Skype" and decided that even if the plaintiff had objected to the use of video conferencing ("VC"), in view of the fundamental right of the defendants:

> to have access to justice as guaranteed under Article 5(1) FC, the court would nevertheless exercise its discretion to proceed with the VC in the interest of justice under O. 32 rr. 10 and 11(1) read with O. 1A and O. 2 r. 1(2) RC.

Conclusion

[49] In my view, in the circumstances of this case and given the increasing acceptance of remote communication technology, it would not be in the interest of justice to allow the transfer application. It would not secure the just, expeditious and economical disposal of the action. Accordingly, I had after hearing counsel for the plaintiff and defendant on 3 September 2020, dismissed the transfer application in encl. 5 with costs of RM20,000 subject to the payment of allocator bearing in mind the application was heard pursuant to a certificate of urgency, the seniority of counsel involved and the amount of materials, submissions and authorities that have to be considered.

[50] I end by thanking counsel for both the plaintiff and the defendant for the submissions they have made which made it easier for me to put up this judgment and I mean no discourtesy to counsel, if I did not make mention of any of the other authorities they have cited as it was not necessary to do so for the reasons I have expressed in coming to the decision I have made.

Endnotes:

1. http: //www.kehakiman.gov.my/sites/default/files/2020-04/Press % 20Release%2017%20April%202020.pdf
2. http://www.kehakiman.gov.my/sites/default/files/Kenyataan%20 Media %20PKPMP%2012%20Jun%202020%20-%20 Perbicaraan%20 Kes%20Secara%20Sidang%20Video%20Bagi%20Mahkamah % 20Persekutuan%20dan%20Mahkamah% 20Rayuan % 20 di % 20 Sabah % 20dan%20Sarawak.pdf
3. http://www.kehakiman.gov.my/sites/default/files/2020-03/ KENYATAAN%20MEDIA%20PKPMP%2026.3.2020%20- %20PEMAKLUMAN%20PENDENGARAN%20KES%20 SECARA %20DALAM%20TALIAN%20SEMASA%20TEMPOH%20 PERINTAH%20KAWALAN%20PERGERAKAN.pdf
4. https://maples.com/en/Knowledge-Centre/Analysis-and-Insights/ 2020/07/Maples-Group-Acts-in-BVICommercial-Courts-First-Remote-Trial
5. https://intranet.kehakiman.gov.my/EAA/arahanamalan/73491-2020-EAA.pdf
6. http://www.kehakiman.gov.my/sites/default/files/Kenyataan% 20Media%20PKPMP%205.6.2020%20-%20Persidangan%20Kes% 20Mahkamah%20Persekutuan%20Malaysia%20Menggunakan %20Sistem%20e-Appellate%20pada%209%20Jun% 202020_0.pdf
7. http://www.kehakiman.gov.my/sites/default/files/2020-04/Press %20Release%20-%20Tayangan%20Langsung%20%28Live %20Streaming%29%20Pendengaran%20Kes%20Secara%20Dalam %20Talian%20%28Online%20Hearing%29.docx.pd